(3)

No. 97-1396

In the Supreme Court of the United States

OCTOBER TERM, 1997

VICKY M. LOPEZ, ET AL., APPELLANTS

v.

MONTEREY COUNTY, CALIFORNIA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

SETH P. WAXMAN
Solicitor General
LORETTA KING
Acting Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
PAUL R.Q. WOLFSON
Assistant to the Solicitor General
MARK L. GROSS
LOUIS E. PERAERTZ
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

25 pp

QUESTION PRESENTED

Whether a county covered by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, may administer voting changes put in place by county ordinances without obtaining either administrative or judicial preclearance of those changes, on the ground that the State, which is not covered by Section 5, enacted those changes into a state statute.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1396

VICKY M. LOPEZ, ET AL., APPELLANTS

v.

MONTEREY COUNTY, CALIFORNIA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

INTEREST OF THE UNITED STATES

This case involves the construction of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. Whenever a jurisdiction covered by Section 5 "shall enact or seek to administer" any change in voting practices or procedures, it must obtain either administrative preclearance from the Attorney General or judicial preclearance from the United States District Court for the District of Columbia for that change. The Attorney General has the responsibility for administering the administrative preclearance process of Section 5 and is authorized to bring suit to enjoin the implementation of unprecleared voting changes. The decision in this case may substantially affect the Attorney General's administrative and enforcement responsibilities under Section 5. The United States has participated in this case as *amicus curiae* in the proceedings in the

district court, on the prior appeal to this Court, see *Lopez* v. *Monterey County*, 117 S. Ct. 340 (1996), and in support of appellants' application for a stay of the district court's judgment pending the present appeal.

STATEMENT

1. Much of the procedural history of this case is set forth in the Court's prior opinion in the case, *Lopez* v. *Monterey County*, 117 S. Ct. 340 (1996). In 1971, the Attorney General designated Monterey County, California, as a covered jurisdiction under Sections 4(b) and 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973b(b) and 1973c. As a consequence, Section 5 of the Act requires the County to obtain either administrative or judicial preclearance of any voting practice in the County different from the practices in effect on November 1, 1968. *Lopez*, 117 S. Ct. at 343. The State of California is only partially covered by Section 5; it is not covered as a State, but several political subdivisions within the State are covered. See 28 C.F.R. Pt. 51, App.

On November 1, 1968, the County had nine inferior court districts. Two of the districts were municipal court districts, each served by two judges. The other seven court districts were justice districts, each served by a single judge. Each of the municipal and justice courts operated separately and independently. Judges for each court were elected at large by the voters of their respective districts, and they served only the judicial district in which they were elected. *Lopez*, 117 S. Ct. at 343-344.

Between 1972 and 1983, the County adopted a series of court consolidation ordinances, which ultimately merged the seven justice court districts and the two municipal court districts into a single, county-wide municipal court, served by nine judges whom Monterey County residents elected at large. The County did not seek Section 5 preclearance of any of the consolidation ordinances. *Lopez*,

117 S. Ct. at 344. The State of California also enacted legislation directed at various aspects of Monterey County's judicial system, including consolidation of court districts and appointment and compensation of court personnel. *Ibid.* (citing Cal. Gov't Code tit. 8, ch. 10 (§§ 73300-74999) (West 1993)). Some of these laws have reflected changes in the County's judicial districts resulting from the consolidation process. *Ibid.* For example, on June 5, 1979, the Monterey County Board of Supervisors adopted Ordinance No. 2524, which consolidated the Monterey Peninsula Judicial District, the North Monterey County Judicial District, and the Salinas Judicial District into a single municipal court district, the Monterey County Municipal Court District. J.S. App. 75. Later that year, the State also enacted that consolidation into state law when the California legislature amended Section 73560 of the California Government Code. That 1979 amendment of the state code was never precleared. See *id.* at 6, 32-33.

In 1983, the State submitted to the Attorney General for preclearance legislation that included the county ordinance that consolidated the last two justice court districts with the remaining municipal court district. *Lopez*, 117 S. Ct. at 344. The State did not, however, bring the previous consolidations to the Attorney General's attention. This Court held that the effect of the Attorney General's failure to object to the 1983 legislation was to preclear the final consolidation, but not the previous ones. *Id.* at 345.

2. On September 6, 1991, appellants, Hispanic voters in Monterey County, brought this action in the United States District Court for the Northern District of California. Appellants alleged that the County was in violation of Section 5 by holding judicial elections under ordinances that had never received either administrative or judicial preclearance. On March 31, 1993, the district court held that the consolidation ordinances were election changes

that had not been precleared as required by Section 5, and it directed the County to seek preclearance. The County then brought a judicial preclearance action in the United States District Court for the District of Columbia, but it voluntarily dismissed that action after stipulating that it was unable to show that the ordinances did not have a retrogressive effect on Hispanic voters. *Lopez*, 117 S. Ct. at 345.

After the State intervened in this case and further proceedings revealed that all the parties could not agree on a new election plan, the district court, on December 20, 1994, adopted on an interim basis one of the plans that the County and appellants had proposed. That plan contained three single-judge districts in which Hispanics constituted a majority of the population, and a fourth district that would elect seven judges. The Attorney General precleared the plan for use on an interim basis, and it was used in a June 1995 special election of seven judges. See *Lopez*, 117 S. Ct. at 346.

Shortly after the June 1995 election, this Court decided *Miller* v. *Johnson*, 515 U.S. 900 (1995), in which it held that a congressional redistricting plan for the State of Georgia violated the Equal Protection Clause. After that decision, the district court reconsidered its interim election plan. *Lopez*, 117 S. Ct. at 346. Finding that *Miller* had cast doubt on the constitutionality of the interim plan, the court ordered the County to hold the next judicial election in March 1996 as an at-large, county-wide election—the very scheme that appellants had originally challenged under Section 5 as unprecleared. *Ibid.*

3. This Court reversed, and held that the district court did not have authority to order elections pursuant to ordinances that had not been precleared under Section 5. *Lopez*, 117 S. Ct. at 348. The Court rejected the State's argument that the plan for at-large elections in March

1996 did not have to be precleared because it had been adopted pursuant to the district court's equitable remedial authority. The Court explained that, "where a court adopts a proposal reflecting the policy choices of the people in a covered jurisdiction[,] the preclearance requirement of the Voting Rights Act is applicable." *Ibid.* (internal quotation marks, ellipses, and brackets omitted). The Court concluded that preclearance was necessary here because the "at-large, county-wide system under which the District Court ordered the County to conduct elections undoubtedly reflected the policy choices of the County; it was the same system that the County had adopted in the first place." *Ibid.* (internal quotation marks and brackets omitted).

The State also contended on the previous appeal in this case that "intervening changes in California law have transformed the County's judicial election scheme into a state plan. Therefore, assert[ed] the State, the County is not administering County consolidation ordinances, * * * but is merely implementing California law, for which § 5 preclearance is not needed." *Lopez*, 117 S. Ct. at 347. This Court declined to address that contention; it noted that the district court had not conclusively determined the issue and had stated that it would allow the State to "continue to seek to show that the County was merely administering California law." *Ibid.* The Court therefore left that issue, along with several others that the lower court had not yet addressed, to be resolved on remand. *Ibid.* The Court stressed, however, that "[t]he County has not discharged its obligation to submit its voting changes to either of the forums designated by Congress," and it admonished that "[t]he requirement of federal scrutiny should be satisfied without further delay." *Id.* at 349.

4. On remand, the State filed a motion to dismiss, arguing that, "although the consolidation ordinances were not submitted for preclearance, intervening changes in California law have converted the County's judicial election scheme into a state plan thus negating the need for preclearance." J.S. App. 3. The district court agreed and dismissed appellants' complaint. The district court concluded that, even though a number of county ordinances had consolidated judicial districts before passage of the 1979 state statute amending Section 73560, "by [that amendment], the State clearly dictated that Monterey County would have a single municipal court district." *Id.* at 7. Furthermore, the court stated, the State had continued to change the County's court system in subsequent enactments—for example, a state statute in 1983 had increased the number of judges in the County court system, contingent on the County's consolidation of municipal and justice courts (which was done by county ordinance in 1983, and was precleared by the Department of Justice), and a state constitutional amendment in 1995 had converted justice courts to municipal courts. *Id.* at 7-8. Thus, the court reasoned, "the justice courts as they existed prior to consolidation could not exist today." *Id.* at 8.

The court rejected appellants' argument that, even though the State had enacted various statutes regarding county-wide judicial election districts, nonetheless Section 5 still required preclearance because the County "seek[s] to administer" those voting changes, within the meaning of Section 5, by holding elections under the state plans. The court acknowledged that in *Young* v. *Fordice*, 117 S. Ct. 1228 (1997), this Court held that Mississippi, which is covered by Section 5, was required to obtain preclearance of voting changes that it intended to administer in order to comply with another federal statute. But in the present case, the court stated, appellants "are not objecting to any particular procedural plan by which the County intends to administer voting for a county-wide district. They are objecting to the consolidation itself." J.S. App. 9. And, the court reasoned, "[a]lthough neither the Voting Rights Act nor any case specifically defines 'seek[s] to administer,' it is clear that it must involve some exercise of policy choice and discretion by the covered jurisdiction. The County, as a subordinate jurisdiction of the State, lacks the discretion to choose a voting plan that does not involve a county-wide district." *Ibid.* (citation omitted).

The district court vacated its previous orders extending the terms of the incumbent judges and enjoining elections under the unprecleared ordinances. J.S. App. 9-10. On January 23, 1998, this Court issued a stay of the district court's order. J.S. 7.

ARGUMENT

The district court has held in this case that a local jurisdiction covered by Section 5 of the Voting Rights Act need not obtain preclearance under the Act of changes in voting procedures that it administers if the voting change is also enacted into legislation by a State that is not, as a State, covered by Section 5. That decision is contrary to the plain language of Section 5, which requires preclearance whenever a covered political subdivision *either* enacts or "seek[s] to administer" a voting change. The fact that the State enacted laws requiring the consolidation of the judicial districts did not obviate the County's obligation to preclear these changes when it sought to administer the changes by consolidating the districts. Furthermore, the district court's reasoning that the voting changes at issue in this case did not reflect the policy choices of the County (which adopted ordinances providing for the judicial district consolidations) but rather those of the State (which also enacted those consolidations into law) is clearly incorrect, and is contrary to this Court's

determination on the previous appeal in this case that the voting changes did reflect the policy choices of the County. *Lopez* v. *Monterey County*, 117 S. Ct. 340, 348 (1996). And the district court's judgment, if not reversed, could have serious and adverse implications for the effectiveness of Section 5, for it suggests that local jurisdictions can escape the coverage of Section 5 simply by having state entities enact county voting changes into state law. Accordingly, this Court should reverse the judgment of the district court.

1. a. Section 5 of the Voting Rights Act of 1965 provides, in pertinent part:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in [Section 4(a) of the Act] based upon determinations made under the first sentence of [Section 4(b) of the Act] are in effect *shall enact or seek to administer* any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on * * * November 1, 1968, * * * such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, [or membership in a language minority group] * * * *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission.

42 U.S.C. 1973c (first emphasis added). Section 5's preclearance requirements are triggered whenever a covered jurisdiction "enact[s]" *or* "seek[s] to administer" "any" voting change. The language is not limited to situations—as the district court seemed to believe—in which a covered jurisdiction "seek[s] to administer" a voting change that it has enacted itself. To the contrary, the plain language of Section 5 encompasses the situation in which a covered political subdivision "seek[s] to administer," in that subdivision, a voting change that has been enacted into legislation by the legislature of a State that is not, as a State, covered by the Act.

First, the preclearance requirements of Section 5 apply to any covered "State or political subdivision." The legislative background of the Act reflects that Congress specifically intended to define "political subdivision" as areas of a nondesignated State, to ensure that voting changes in such jurisdictions receive scrutiny under the Act. See *United States* v. *Board of Comm'rs of Sheffield*, 435 U.S. 110, 128-129 (1978). Because Monterey County is covered by Section 5, under the plain terms of the Act it must obtain federal preclearance before it implements "any" voting procedure "different from that in force or effect" in the County on November 1, 1968.

Second, preclearance is required whenever a covered political subdivision shall "enact or seek to administer" a voting change. Congress's use of the disjunctive is presumed to have intended that those terms have different meanings in the statute. See *Bailey* v. *United States*, 516 U.S. 137, 145-146 (1995). That intent is consistent with differences in the ordinary meanings of "enact" and "administer." The term "enact" ordinarily refers to the process by which a legislative body votes a bill into law. See

Black's Law Dictionary 472 (5th ed. 1979) (defining "enact" as "[t]o establish by law" and "enactment" as "[t]he method or process by which a bill in the Legislature becomes a law"); *Webster's Third New International Dictionary* 745 (3d ed. 1986) (def. 2 of "enact": "to establish by legal and authoritative act: make into law; *esp.*: to perform the last act of legislation upon (a bill) that gives the validity of law"). The term "administer," however, is not so limited, and it frequently refers to the implementation of an established legal requirement. See *id.* at 27 (def. 1a(2) of "administer": "to direct or superintend the execution, use, or conduct of"; as in "[administered] the regulations governing interstate travel"). Under the plain language of Section 5, therefore, a covered political subdivision "seek[s] to administer" a voting change when it enforces or implements a law enacted by the legislature of a State that is not covered by Section 5, and that subdivision is required to obtain preclearance for its administration of such a law.[1]

---

[1] Somewhat different considerations apply when a political subunit of a State administers a voting law enacted by the legislature of a State that is covered by Section 5. In those situations, the State must obtain preclearance of the voting change before it can be implemented. If the voting change enacted by the State is precleared, and if the subdivision has no discretion under state law to deviate from the enacted voting change, then the subdivision need not also obtain preclearance before it is implemented. Once the state enactment has been precleared, its implementation by the subdivision does not involve a "change" in voting practices. For example, if a covered State were to enact a voting law changing the hours during which polling places are open, without affording subdivisions discretion to deviate from that rule, and if that enactment were precleared, the law would not also have to be precleared by each subunit that implemented the law. Cf. *City of Monroe* v. *United States*, 118 S. Ct. 400, 401 (1997) ("Since the Attorney General precleared the default rule, Monroe may implement it.").

b. The Attorney General has long construed Section 5 to require that a covered political subdivision must seek preclearance when it implements voting changes enacted by a partially covered State, and that longstanding construction of Section 5 is entitled to deference. See *Sheffield Bd. of Comm'rs*, 435 U.S. at 131. The Attorney General has consistently taken that position in litigation. See, *e.g.*, *United States* v. *Onslow County*, 683 F. Supp. 1021 (E.D.N.C. 1988) (local legislation enacted by North Carolina General Assembly requiring staggered terms for county commissioners in a covered political subdivision held subject to preclearance requirement); *Haith* v. *Martin*, 618 F. Supp. 410 (E.D.N.C. 1985) (North Carolina legislation changing superior court judge election system held subject to preclearance requirement in 40 counties covered by Section 5), aff'd mem., 477 U.S. 901 (1986); *United States* v. *South Dakota*, No. 79-3039 (D.S.D. May 21, 1980) (South Dakota legislation affecting organization of elected officials in State's two covered counties is subject to preclearance requirement). For the reasons explained above, the Attorney General's position is fully consistent with the text of the statute, which requires preclearance whenever a covered political subdivision "seek[s] to administer" a voting change.

The Senate Report accompanying the 1982 extension of Section 5 also noted that, between 1975 and 1980, the Attorney General objected to voting changes enacted by North Carolina, South Dakota, and New York City—entities only partially covered by Section 5—because the submitting jurisdiction had failed to show that those changes did not discriminate against minority voters in political subdivisions of those entities that were covered by Section 5. S. Rep. No. 417, 97th Cong., 2d Sess. 10-11

(1982).[2] The Senate Report expressed agreement with the Attorney General's position that voting changes applicable to a covered political subdivision within a State but enacted by a State not independently subject to Section 5 must be precleared before they may be administered. See *id.* at 12 n.32 ("While North Carolina, as a State, is not subject to Section 5, [redistricting] legislation in question affected North Carolina counties which are covered and, therefore, it should have been precleared."); cf. *Sheffield Bd. of Comm'rs*, 435 U.S. at 132-134 (noting similar congressional agreement with Attorney General's construction of Section 5 as applicable to all political subunits of a covered State). "When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation." *Id.* at 134. Accordingly, the Attorney General's construction of Section 5 as applicable to cases like this one should be given controlling weight.

2. The district court concluded that a covered political subdivision need not seek preclearance when it administers a law enacted by a partially covered State based upon the following determinations: (a) the language of Section 5, it believed, "does not apply to an uncovered state which 'enact[s] or seek[s] to administer' a voting plan in a subordinate, covered county"; (b) "the purpose of § 5 appears to be to target only those enactments by jurisdictions suspected of abridging the right to vote and not those put in force by a non-covered, superior jurisdiction"; and therefore (c) "the question here is whether the State of California, rather than the County, 'enact[ed]' and 'seek[s] to administer' the county-wide voting plan in Monterey County." J.S. App. 4-5 (footnote omitted).

[2] There was no conference report on the 1982 extension of the Voting Rights Act; the House of Representatives adopted the version of the legislation passed by the Senate. See 128 Cong. Rec. 14,933-14,940 (1982). The Court has described the Senate Report as the "authoritative source" of the legislative history for the 1982 extension of the Act. *Thornburg* v. *Gingles*, 478 U.S. 30, 43 n.7 (1986).

The district court's analysis is fundamentally in error, for it uses the terms "enact" and "seek to administer" interchangeably. As we have explained above, Congress's use of those terms in the disjunctive indicates that it intended the terms to have different meanings, and the ordinary meaning of "to administer" also encompasses a political subdivision's implementation of a state law. Under the district court's interpretation, by contrast, the phrase "seek to administer" would be rendered superfluous in cases like this one. That result demonstrates that the district court's construction of Section 5 is flawed. See *Bailey*, 516 U.S. at 146 ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.").

Moreover, the district court's construction of Section 5 could create a very serious loophole that would endanger the achievement of the Act's purposes. If the district court's construction of Section 5 were adopted, then a political subdivision covered by Section 5 could effectively evade the preclearance requirement through the simple expedient of requesting that the state legislature validate its voting changes.[3] Under the practice of "local courtesy" that prevails in many state legislatures, it is customary for state legislators to approve locally applicable

[3] Political subdivisions in seven States that are not themselves covered by Section 5—California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota—are currently covered by Section 5. See 28 C.F.R. Pt. 51, App. Department of Justice records reflect that, during the time in which political subdivisions in those States have been covered by Section 5, at least 1300 state laws applicable in the covered political subdivisions have been submitted to the Attorney General for preclearance.

legislation that is sponsored by the local jurisdiction's legislative delegation. "In many state legislatures, approval is given without question or dissent to any purely local bill that has the support of any and all legislators from the county concerned." D. Lawrence, *Local Government Officials as Fiduciaries: The Appropriate Standard*, 71 U. Det. Mercy L. Rev. 1, 27 n.91 (1993) (quoting M. Jewell & S. Patterson, *The Legislative Process in the United States* 240 (3d ed. 1977)).[4] Indeed, most States partially covered by Section 5's requirement of preclearance permit political subdivisions to propose to state authorities laws specific to that subdivision.[5]

---

[4] See also B. Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act*, 102 Yale L.J. 105, 121, 128-131 (1992) (discussing local courtesy). The Court has expressed its awareness of the custom of local courtesy. See *Rogers* v. *Lodge*, 458 U.S. 613, 626 (1982) (noting that the "maintenance of [a Georgia] state statute providing for at-large elections in Burke County is determined by Burke County's state representatives, for the legislature defers to their wishes on matters of purely local application"); *City of Mobile* v. *Bolden*, 446 U.S. 55, 74 n.21 (1980) (plurality opinion); *Reynolds* v. *Sims*, 377 U.S. 533, 580-581 (1964) ("In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions.").

[5] See Cal. Gov't Code § 23714 (West 1988) (when majority of voters in a county ratify charter proposal, that proposal shall be submitted to Secretary of State); Fla. Const. art. 8, § 1, cl. (i) (county ordinances are approved after they are filed with Secretary of State); Mich. Const. art. IV, § 4 (providing for territory of a county, which is being annexed to a city, to become part of the city for senatorial elections, if city ordinance is passed and certified by Secretary of State); N.Y. Const. art. 9, § 1, cl. (h)(1) (counties may propose special laws that alter the form of government in that county); N.C. Gen. Stat. § 153A-22 (1991) (providing for the redefinition of electoral districts if resolution is filed with Secretary of State).

The loophole created by the district court's construction of Section 5 is reminiscent of the potential loophole perceived by the Court in *United States* v. *Board of Commissioners of Sheffield*, 435 U.S. 110 (1978). In that case, the Court held that all political units within a State covered by Section 5 that have power over any aspect of the electoral process are also covered by Section 5. *Id.* at 118. The Court's concern in *Sheffield* was that, unless all such political units in a covered State were also covered, a State could evade Section 5 by implementing its voting changes through its political subunits. *Id.* at 125. Justice Powell agreed with the Court's construction of Section 5 in that case because, otherwise, "[a] covered State or political subdivision * * * could achieve through its instrumentalities what it could not do itself without preclearance." *Id.* at 139 (Powell, J., concurring in part and concurring in the judgment).

The problem in a case like this one is simply the mirror image of the problem in *Sheffield*. Here, the danger is that a covered political subdivision may evade Section 5 by routing its changes in voting procedures through officials of a State that is not separately covered, including the local delegation in the state legislature. In such a fashion, a political subdivision could effectively immunize itself from the requirements of Section 5, even though it has been designated as covered by the Act under the criteria set forth by Congress in Section 4(b), and even though the jurisdiction has not followed the procedures for a "bailout" suit under Section 4(a) for exemption from the preclearance requirements of Section 5.[6]

---

[6] For the same reason, the district court's suggestion that Section 5 is directed only at those entities that are themselves suspected of discrimination (J.S. App. 5) is wide of the mark. The court's construction of Section 5 could readily enable covered jurisdictions to escape Section 5 scrutiny by enlisting the assistance of their noncovered

For that reason alone, the district court's construction of Section 5 should be rejected. The Court has repeatedly explained that the Voting Rights Act "was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race," *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 501 (1992) (quoting *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 565 (1969)), and it has construed Section 5 to ensure that its preclearance requirements are not evaded through devices that could have the effect of diluting its protections, see *Sheffield Bd. of Comm'rs*, 435 U.S. at 123. See also *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966) (noting that "Congress had reason to suppose that [covered jurisdictions] might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself"); S. Rep. No. 295, 94th Cong., 1st Sess. 15 (1975) (similar). Thus, "Section 5 of the Act requires review of all voting changes prior to implementation by the covered jurisdictions." *Ibid.*

The district court's construction of Section 5 could well exclude from preclearance a state-wide legislative redistricting plan in a partially covered State, even if that plan had a discriminatory purpose or effect on residents of a covered political subdivision within the State. Thus, under the district court's construction, the redistricting plans at issue in cases like *United Jewish Organizations*

States. Moreover, Section 5 protects minority voters who reside within a covered political subdivision against voting discrimination, irrespective of the proximate source of the law that causes the discrimination. Cf. *Dougherty County Bd. of Educ.* v. *White*, 439 U.S. 32, 47 (1978) ("Congress was determined * * * to provide some mechanism for coping with all potentially discriminatory enactments whose *source* and forms it could not anticipate but whose impact on the electoral process [in a covered jurisdiction] could be significant.") (emphasis added).

v. *Carey*, 430 U.S. 144 (1977), might well not have been subject to the Section 5 preclearance requirement because New York, as a State, is not covered by Section 5, even though counties affected by the restricting plan were covered by Section 5.[7] In our view, Congress did not intend to permit the protections of Section 5 to be circumvented in that manner.

3. In dismissing this case, the district court also expressed the view that preclearance is not required because Monterey County now "lacks the discretion to choose a voting plan that does not involve a county-wide district." J.S. App. 9. That rationale is unavailing for two reasons. First, as we have explained above, the plain language of Section 5 requires a covered political subdivision to obtain preclearance whenever it "seek[s] to administer" *any* voting change. There is no exception in the language of the statute for "non-discretionary" administration of a state law.

Second, even if the district court's inquiry into the exercise of discretion might have merit in another case, it is misplaced in this case, for this Court has already found that the decision to consolidate the judicial districts in Monterey County was that of the County itself. This Court concluded, in the first appeal of this case, that the "at-large, county-wide system under which the District Court ordered the County to conduct elections undoubtedly reflected the policy choices of the County; it was the same system that the County had adopted in the first place." *Lopez*, 117 S. Ct. at 348 (internal quotation marks and brackets omitted). That conclusion remains correct. On remand, the district court found that, even before the

[7] Indeed, in *United Jewish Organizations*, the Court noted that New York had unsuccessfully pursued a "bailout suit" under Section 4(a) to obtain an exemption from Section 5 for the three counties that were at issue in that case. See 430 U.S. at 148 & n.3.

California legislature moved in 1979 to require a single municipal court district in the County, "a number of county ordinances did consolidate judicial districts." J.S. App. 7. Therefore, this case presents a circumstance in which a covered subdivision adopted voting changes that the State later ratified in state law, and the "discretion" exercised was that of the County. The voting changes at issue here clearly reflected the "policy choices" of the covered political subdivision (see *Lopez*, 117 S. Ct. at 348)—whether or not they *also* reflected the policy choices of the State.[8]

This case, therefore, does not require the Court to address whether Section 5 preclearance is necessary when a State that is not covered as a State enacts a voting change into law *without* exercising or considering the policy choices of a covered political subdivision, and the covered subdivision is afforded no discretion in administering that law. In *Young* v. *Fordice*, 117 S. Ct. 1228, 1235 (1997), the Court suggested that, when a covered jurisdiction seeks to implement a federal law, Section 5 preclearance may not be necessary if the law leaves the covered jurisdiction with

---

[8] The district court also noted that the 1995 amendment to the California Constitution converted all justice courts into municipal courts (J.S. App. 8), but it appears to have misapprehended the relation of that amendment to this case. The constitutional amendment did not effect any change with respect to voting in Monterey County; it simply changed the names of the then-existing justice courts to municipal courts and provided authority for future changes. The amendment was precleared by the Attorney General as "enabling," because subsequent legislation would be necessary to make any change affecting the election of judges to those courts in covered counties. Moreover, as we have noted above, the legislation and ordinances that consolidated the justice courts and municipal courts in Monterey County were all enacted well before that constitutional amendment; the Attorney General precleared the ultimate 1983 consolidation, but not the consolidations preceding it. See *Lopez*, 117 S. Ct. at 344-345.

no discretion as to how it may implement that federal law. The Court has never addressed whether or how that "lack of discretion" concept would apply to a situation in which a covered political subdivision must administer voting changes under *state* law. But in cases concerning voting changes mandated by partially covered States, this Court has assumed—correctly in our view—that such changes are subject to Section 5's preclearance mandates if they affect covered political subdivisions. For example, in *United Jewish Organizations* v. *Carey*, 430 U.S. at 156-157, the Court explained that when New York, a State that is partially covered by Section 5, enacted statutes requiring redistricting of counties, those statutes were subject to Section 5's preclearance mandates insofar as they affected counties that had been determined to be covered political subdivisions. See also *Shaw* v. *Hunt*, 116 S. Ct. 1894, 1904 (1996) (involving redistricting statute enacted by North Carolina, a partially covered State); *Gingles* v. *Edmisten*, 590 F. Supp. 345, 350-351 (E.D.N.C. 1984) (similar), aff'd in part & rev'd in part *sub nom. Thornburg* v. *Gingles*, 478 U.S. 30 (1986).

4. For the reasons discussed above, the district court's judgment is clearly in error. It has been more than 25 years since Monterey County administered the first of the unprecleared changes at issue, and more than 6-1/2 years since this action was filed. In its 1996 opinion in this case, this Court expressed its concern that "[t]he County has not discharged its obligation to submit its voting changes to either of the forums designated by Congress," and it instructed that "[t]he requirement of federal scrutiny should be satisfied without further delay." *Lopez*, 117 S. Ct. at 349. The Court also stated that the district court bore some of the responsibility for the delay in this case, *ibid.*, and yet the delay has continued; moreover, there remain other issues that the district court may be asked

to address before this case is finally adjudicated at the trial level. See *id.* at 347. The district court's errors in this case clearly warrant reversal of the judgment, and the Court may wish to consider summary reversal in order to avoid a delay of another year in the ultimate resolution of this case.

CONCLUSION

The Court should note probable jurisdiction. The Court may wish to consider summary reversal.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LORETTA KING
Acting Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
PAUL R.Q. WOLFSON
Assistant to the Solicitor General
MARK L. GROSS
LOUIS E. PERAERTZ
Attorneys

MARCH 1998